

SECRETS OF WINNING OPENING STATEMENTS

STEVEN P. GILLIAM

Smith, Gilliam, Williams & Miles, P.A.
Gainesville, Georgia 30501

Table of Contents

I.	Introduction.....	2
II.	Conquering Fear.....	3
III.	Determining The Righteousness of Your Cause.....	5
IV.	Getting Into Character.....	5
V.	Thoroughly Prepare What You Are Going to Say.....	6
VI.	Relaxation Before Battle Vs. The “Rocky” Theory.....	7
VII.	The Delivery.....	8
VIII.	Aids.....	12
IX.	Conclusion.....	13

SECRETS OF WINNING OPENING STATEMENTS

CARLSON ON EVIDENCE INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA March 26, 2010

STEVEN P. GILLIAM
Smith, Gilliam, Williams & Miles, P.A.
310 Green Street, Suite 200
Gainesville, Georgia 30501

I. INTRODUCTION

How I would like to approach this conversation with you this morning is to review some basic principles that I have learned over the years and then discuss some practical applications of those principles with actual court room dialogue and examples. While I am going through the examples, if you think of any that have been successful in your practice of law, please feel free to raise your hand and give that example. We are all here to learn, including me. In beginning my introduction, I am going to start with Prof. Carlson's conclusion in his paper. "Perhaps, no area of trial practice is as critical nor enigmatic as that of opening statements. It is an area which successful lawyers must master because a slow start can doom ones effort. As one commentator remarks, a trial is like an athletic contest in this respect. It is hard to come from behind and win." Interestingly, I wrote my paper some 10 years ago before I saw Prof. Carlson's paper recently, and I started out my introduction comparing a trial to an athletic contest.

Envision yourself as an athlete entering your first 440 meter run. You have slept late every morning, you have overeaten, you have run when you wanted to (if your schedule permitted it), and you have failed to follow the training schedule laid down by your coach. As you enter the stadium, you look for the awards platform where you are certain you will receive your first place medal. You begin to psych yourself up by reaching deep down inside and willing your body to produce its best so that you will win. NOT! No matter how much you will your body to win and no matter how perfect your attitude is on this race day, you will not be able to win if you have not properly prepared your body. The same goes with preparing yourself to deliver the message of your case to a jury. If

you have not thoroughly prepared your case, no matter how much you will yourself to win and project a winning attitude, you will in all likelihood come up on the losing end. Therefore, any discussion concerning winning attitudes presupposes that the reader or listener has properly and thoroughly prepared their case.

Prof. Carlson also states that pundits of trial advocacy cite statistics that as high as 80% of jurors decide the outcome of a case right after openings. Of course, if this is true, then jurors are violating their sworn oath to not make a decision until after they have heard all the evidence, closing arguments by counsel, and instructions on the law by the judge. While this may or may not be true, what is true is you can lose a case by failing to prepare for and deliver a winning opening statement.

In preparing to deliver the message, I will be discussing six areas that I feel one should mentally address.

- (1) Conquering fear
- (2) Determining the righteousness of your cause
- (3) Developing passion (getting in the character)
- (4) Thoroughly prepare what you are going to say and practice
- (5) Relaxation before battle vs. the "Rocky" theory
- (6) Delivery of the message

II. CONQUERING FEAR

"Heroism is the brilliant triumph of the soul over the flesh - that is to say over fear: fear of poverty, of suffering, of calamity, of sickness, of isolation, of loss, and of death. Heroism is the dazzling and glorious concentration of courage." Henri Frederic Amiel, Swiss Philosopher.

Amiel's quote spells out the greatest fears of any lawyer getting ready to go into the courtroom. He or she aspires to be the conquering hero leading forth his charges (clients), into the field of battle (the courtroom) with their soldiers at their side (associates, paralegals, staff, and witnesses). However, each attorney entering the courtroom often experiences fear. Fear of loss, fear of disappointment, and yes, even fear of calamity. How does one overcome fear and turn that to one's advantage?

Dale Carnegie lists four facts about fear of speaking in public.

- (1) You are not unique in your fear of speaking in public.

- (2) A certain amount of stage fright is useful.
- (3) You will never lose your stage fright
- (4) The chief cause of fear is simply being unaccustomed to speaking in public.¹

Those four can easily be translated into trial practice.

(1) As a trial lawyer, you are not unique in fearing loss, isolation, or committing some act of stupidity during the trial of a case, etc. So recognize it, accept it, and be ready - not fearful.

(2) It is certainly okay to have some stage fright as it keeps you on your toes. Have you ever assisted in the trial of a case where you are not responsible for anything other than shifting papers, notes, and messages? How boring was it? Furthermore, how many times have you told witnesses you understand their nervousness, so "just try to relax"? Have you ever watched the nervousness of jurors who undergo voir dire? Let's face it, every trial has tense moments. Notice here, I am referring to nerves, not fear.

(3) The other side is just as fearful of losing as you are, and since it is not going away for either of you, do as you instruct your witnesses to do. "Take a deep breath, speak slowly and distinctly, and try to relax."

(4) In order to become accustomed to speaking, practice, practice, and practice. In order to get over your jitters speak as soon as is practical in court, before jurors, bailiffs, or the courthouse gang on a matter you have planned in advance and on which you are well-versed. Remember how sports figures talk of butterflies until that first hit, strike, or basket. Therefore, again, as you tell your witnesses, "take a deep breath and speak slowly and distinctly. My own personal opinion is that an attorney's greatest fear is the fear of losing. However, if you're going to try cases, let's face it, you are going to lose some of those cases. If all else fails, do like most doctors do when called upon to speak in public - take a beta-blocker like Inderal to slow down your heartbeat. If that doesn't work, become a bond lawyer. Reading those documents is a sure fire way of relaxing yourself to the point of deep sleep. Prepare yourself the best you can, and most of the fear you face will be replaced by confidence.

Another fear is brought on by clients with unreal expectation. So prior to trial have an honest and frank discussion about your case with your clients so that unreal expectations are minimized.

III. DETERMINING THE RIGHTEOUSNESS OF YOUR CAUSE

Before any case can be properly presented to a jury, you must first determine the righteousness of your cause; second, develop a theme around that righteousness; and third, develop a passion for that theme. In developing your theme, you must recognize that developing your case in one overall theme, is better than many themes. However, if all the facts cannot be encompassed within one theme, then the main theme must be able to encompass all of the underlying themes. You must also recognize that whatever theme you present, you should account for everything in a common sense approach that a jury will not only comprehend and understand, but will accept as truth. Therefore, the most important aspect in developing your passion is to maintain credibility. All your credibility is established with the jury and the court by sincerity, honesty, and courtesy. Taken together, these add up to the art of persuasion. Jurors look for trustworthiness in attorneys as well as common sense arguments. Remember you are persuading a jury, not pleading with a jury. Pleading with a jury is both demeaning to you and your case while persuading a jury shows your confidence and passion in your case. In his book, Trying Cases to Win, Herbert J. Stern states that not only must the jury believe that you believe, they must believe in you.² When jurors believe in the lawyer, they are likely to believe his or her witnesses. Determining the righteousness of your case gives you something to present the jury in which they can believe.

IV. GETTING INTO CHARACTER

According to Webster's New World Dictionary, College Edition, character is defined as an individual's pattern of behavior or personality, moral constitution, self-discipline or fortitude. It is also defined as a person conspicuously different from others, i.e., a queer or eccentric person. Never could a word be used to describe two completely different personality traits or personalities. During the trial of a case, you should be of good character but not be a character. You should also be an actor. However, as an actor, a lawyer must convey his or her passion or the righteousness of their cause with sincerity. Without the sincerity, the lawyer loses credibility with the jury.

In developing your character, an attorney merges his own personality traits, experience, and talents into the trial of the case. In developing your traits as an actor, you should determine how to deliver your client's cause. If you want to convey to a jury how your client has suffered through life in a wheelchair, how better to convey that idea than to have experienced several hours, or days, in a wheelchair yourself. If a client has been blinded, how better to convey how difficult it is to pour a cup of hot coffee by the burning the tip of your finger as the coffee reaches the top of the cup. However, consistent with the idea of maintaining credibility with the jury and putting yourself in the character for the trial of a case, you must also maintain good character.

On the defendant's side, it is often difficult to put yourself into the character of your client, unless you have a sympathetic client. Therefore, to maintain credibility with the court and jury, you must constantly maintain good character. Arrogance is out - courtesy is in. As a defense attorney, you need to foresee those moments when your client will be castigated, disparaged, kicked around, and cast into the deep, vast depths of Hell by plaintiff's counsel. How you react to this will be watched closely by the jury. Therefore, you must prepare yourself to act with dignity, common sense, restraint, and above all, watch your body language. Create in your mind a visual image of these occurrences and prepare yourself to react accordingly. Also, keep in mind that your turn will come to present your side of the case and/or thoroughly conduct cross-examination in which you hope to reveal the weaknesses in the plaintiff's case. If mistakes are made by opposing counsel, you may even have a chance to confront your adversary's credibility.

V. THOROUGHLY PREPARE WHAT YOU ARE GOING TO SAY

Whether it be questions for voir dire, opening argument, questions for witnesses, or your closing argument, almost all commentators and experts state that all of these should at some point prior to trial be committed to writing and reviewed. The reasons are as follows:

(1) The actual mental exercise of going through the writing requires you to organize your thoughts, commit the concepts to memory. By reading them back, you will learn to phrase each appropriately and convincingly.

(2) Such a written document prepares an outline of the case and enables you to address weaknesses as well as strengths and be ready to respond as those occur.

(3) If all else fails, fear overcomes you, you feel on the verge of panic, and you have forgotten what you were going to ask or say, you will always have something in writing to refer to. That is not to say you should memorize what you have written. Rather you should learn the concepts and trains of thought in either the questioning or the oratory. If you feel more comfortable in reading the written question, make sure the questions and answers flow in the appropriate order. However, it is always better in an oratorical sense to use visual aids to accompany your openings or closings. Appropriately prepared, these will provide you with all the information necessary for your opening or closing to the jury without the necessity of reading a written speech. Further, studies show that after a couple of hours, even days, jurors remember more of what was seen rather than what was heard.

(4) Writing an outline or questions for witnesses helps develop your theme. It also makes you recognize your weaknesses. Lawyers should not overlook their weaknesses, but should be prepared to address them. If there are no weaknesses in your case, you should feel confident that victory is at hand.

VI. RELAXATION BEFORE BATTLE VS. THE "ROCKY" THEORY

"Hast thou not known? Hast thou not heard, that the everlasting God, the Lord, the Creator of the ends of the earth, thinketh not, neither is weary? There is no searching of His understanding."

"He giveth power to the faint, and to them that hath no might He increases strength..."

"But they that wait upon the Lord shall renew their strength; they shall mount up with wings as eagles; they shall run and not be weary; and they shall walk and not faint." Isaiah 40:28, 29, 31 (King James Version).

Whether it is your dependence upon the Lord God for your strength, or some other faith, or your inner self, each of us requires some deep inner preparedness prior to going into the courtroom for battle. Personally, reading that Bible verse makes me want to soar to even greater heights. How can you lose with God on your side and the righteousness of your cause demands victory?

Some attorneys before the battle continue preparation up to the night before in hopes that any item which has been overlooked will be discovered. Others subscribe to the "Rocky" theory, i.e., watch the movie Rocky, play Chariots of Fire, and do whatever is necessary to pump themselves up for the next day. Still others like to relax before trial.

The type of trial may dictate the type of technique you use, i.e., if the case calls for restraint, dignity, and courtesy, one might opt for mediation. On the other hand, if you are the plaintiff and beginning the charge, certainly Rocky on some other movie or speech may well give you the adrenaline rush necessary to go into the courtroom. Just remember to leave the real boxing gloves at home. Whatever you do, be yourself, not someone else.

VII. THE DELIVERY

Today's jurors are used to being told a story. Through television, videos, DVD's, books on tape, jurors are used to listening and seeing a story. Each story has a title and a theme. Therefore, it is important that you develop your theme and your story early on and then practice the delivery.

In making your opening statement, remember you are telling a story, not making a speech. You are also not delivering a closing argument, which are filled with arguments and attacks against the other side. Since you are telling a story, it should be simple, but delivered with confidence, positivity, and emotion.

As stated earlier, when delivering your opening statement, be yourself. Some trial lawyers tend to be flashy and dramatic. If you are not flashy and dramatic, don't try to be. Remember you are making a second impression on the jury (the first impression is during voir dire), but now you are telling your client's story.

If you have developed a theme (and you should) state the facts in accordance with that theme, but at the same time, focus on the issues. Whatever you do, don't exaggerate or overstate your case. If there are facts which you feel are important enough that the other side cannot challenge, don't hesitate to be dramatic and state the fact the other side will not contest or cannot contest. For instance, if liability in the case has been admitted, tell the jury. If the other side has problems in proving its portion of the case, dare them to prove it. If you are defending the case, listen carefully to what opposing counsel says, and if in haste or over reaching, opposing counsel says something you know he or she cannot prove, pounce on it and dare them to prove it.

In preparing your delivery, remember that you will be on a stage. Think of some of the best presentations you have ever seen someone on stage deliver, and don't be afraid to copy their style if it fits your personality. Those I have seen which work the best are conversational, sincere, simple, and with emotion. Remember you are conversing with the jury, not talking down to them. So, prepare yourself, be yourself, and enjoy yourself. Most lawyers in their opening statements now use a narrative or story telling structure in presenting their openings. The elements of the opening statement consist of an introduction, a body which develops the evidence in the same way that a story or drama develops and a conclusion.

In the introduction to the opening of the personal injury case the lawyer tells the jury that the opening is where the lawyers have a chance to get acquainted with the jurors, the parties, and the facts of the case. Some may refer to it as looking at a picture on the box of a picture puzzle and the pieces of the puzzle are the pieces of evidence that will come in during the trial of the case. Other lawyers may refer to it as a "birds eye view of the evidence that will follow." Others may state what they expect to prove, others state they will provide an outline, still others a road map. You may have your own explanation you use. Most importantly, all engage the jury by explaining to the jury their role.

Let's look to creative and specific ways of engaging the jury. In tax appeals, I tell the jury they will be acting as the boss of the tax assessor. In other words, it will be their job to learn about tax assessments, how property is to be assessed and then they will review the actions of the tax assessor, in light of what they will learn. Then I proceed to tell them how to be a chief tax assessor and boss. Since you are talking about appraisals, it can be pretty dry so you want to engage the jurors that it is their job.

In condemnation cases, which likewise are pretty dry, unless you get the DOT or Georgia Power or the other condemning authority to have made mistakes, you tell the jury that they are upholding the Constitution of the United States and the State of Georgia, which states that no condemning authority can take property without just and adequate compensation. Then you tell them they are going to be a real estate appraiser and will be taught appraisal techniques as their job in upholding the Constitution of the United States and State of Georgia to determine what the just and adequate compensation is. In light of declining residential real estate values, the opening

statement has to be used as the vehicle to let the jury know the values are as of the date of taking, not presently, not in the present market.

I don't practice divorce law but I asked Kelly Miles, a partner in my firm who does a lot of divorce cases what her model opening would be for a husband who is involved in a divorce due to a steamy affair. This would be after plaintiff's counsel has viciously attacked him. Kelly says that she is brutally honest with the jury. She explains that her client is human. In our society, marriages fail. When marriages fail, people do things that, while society may not condone it, on a personal human level they do things other people do outside of the marital relationship and that is seek friendship, comfort, and love. That before the affair began, the marriage had been dead for quite sometime and was over. The marriage was over for various reasons, which may or may not include the wife's coldness, involvement in her own affairs or life, activities which destroyed the marriage. Then during the trial of the case, she puts a human face on it and her theme for the client to admit he has made mistakes, he regrets those mistakes, but "I am human". So, she's telling the jurors to judge her client as a human being, one with human frailties.

I said, well let's put the shoe on the other foot. What do you say if you are representing the wife? Without missing a beat, she said, this was a wonderful marriage until the husband entered into a relationship with someone else, gave up on the marriage and family, and walked away from his wife and family shirking his responsibilities. Then she goes on to talk about responsibilities and that will be the theme of her trial, human responsibilities rather than human failures. She's telling the jury to judge her clients responsibilities.

The second part of the opening statement which follows the introduction is the body of the opening statement. Again, using a story telling narrative, this is used to provide the central action of the story and the relationships between the action and the parties. For instance, in a personal injury case, the background, the parties and things involved, how the injury occurred and the nature and extent of the damages. In a condemnation case, it would be parties, the taking of the property by the DOT or other condemning authority, the value of the property and how it is determined and why your witnesses should be believed as opposed to deficiencies of opposing counsel's witnesses.

The final part of the opening statement will be the conclusion and that is what you will be asking the jury to do. In a personal injury case, you will be asking for damages for lost earnings, medical expenses, and physical and mental damages. In a commercial litigation case involving a breach of contract, you would set forth your breach of contract damages. In a divorce case you would be asking for property division, alimony, or child

The opening should also personalize parties and witnesses.

It's usually pretty easy to personalize the parties and witnesses for the plaintiff in a personal injury case. In representing corporations in commercial disputes or in personal injury cases, it is incumbent in the opening statement that you personalize the corporation. The corporation only acts through the actions of its employees. I use this to show that the actions that are being challenged are those of the employees. Assuming the plaintiff's counsel has attacked the personal integrity of my clients, then the opening statement is my responsibility to build up that reputation. I tried a case one time where the Plaintiff's counsel got up and talked about his client being a fine upstanding member of the community, participated in various civic functions, church, and alike. When it came my turn, I did the same thing. I talked about what a fine corporate citizen my corporate client was and he objected. My response was he talked about what a fine upstanding citizen his client was, he opened the door, so I am allowed to talk about mine. The judge ruled I could and I laid out all of the wonderful achievements of my corporate client, which also later was introduced in the evidence. Not only that, I talked about the wonderful civic achievements and church activities of the person he was attacking on behalf of the corporation.

My point is, seize upon the fact that the opening statement gives you a great opportunity to be creative, so be creative. On the plaintiff's side, be creative with pushing as far as you can but without opening the door for the defense to respond. If you are representing the defendant, listen carefully to what the plaintiff says and seize upon any opportunity to take advantage of any doors that have been opened.

Seizing Upon Mistakes in Opposing Counsel's Opening:

When making your opening statement, be very careful not to state facts which can open the door for what otherwise may be inadmissible facts to now come into evidence. A perfect example is a condemnation case I tried about 10 years ago. In condemnation cases, the amount of money that the DOT has paid into court, no matter how low or

ridiculous it is, is not admissible during the trial of the case. Lawyers representing condemnees would love to get before the jury what we consider to be bait and switch practices by the DOT. The DOT pays into court a very low amount hoping that the condemnees will take it. On Appeal and shortly before trial, the DOT will have its appraisal updated, which almost always is significantly greater than the amount paid into court. In this particular case I was trying, counsel for the DOT stated before the jury that the issue to be determined by the jury was simply one of money. The DOT was required to pay money into court when it acquired property and had done so. It had not low balled the condemnee by paying a low amount in. After the opening statement, I walked up to the judge and said, I want to state in my opening statement the amount that they paid into court so the jury could compare what the DOT is now saying it's willing to pay so it can decide if the DOT low balled the condemnee. The DOT filing was \$10,000.00. The testimony now would be \$60,000.00, a year and a half later and with a different appraiser. The judge ruled that since the DOT attorney had opened the door by using the "low ball" comment, I could put those amounts into evidence. In talking with the jury later, it made a dramatic impact on them because contrary to counsel's statement that the DOT did not low ball the case, they clearly believe there had been a low ball amount paid.

VIII. AIDS

Another part of delivering the message is determining what aids or demonstrative evidence you use in opening statements. Typically, timelines, charts, computer power points, photographs, can be used during opening statements to the extent they are germane and can have a dramatic impact. Medical Illustrations are more and more being used to show injuries and surgeries. Just make sure the doctor has reviewed it so it truly and accurately depicts the injury or surgery being shown. Make sure you have agreements with counsel what you can use and if you can't get an agreement with counsel bring it to the court's attention, either at the pretrial or prior to the opening statement by filing a motion in limine to allow it. Watch your pretrial order and a lot of times in the stipulation section, stipulate what you would like to use during your opening statement so you don't have any objections as to what is going to be used and you can plan your opening around those items.

Just remember in using computer technology, make sure you do a run through prior to opening. I remember several years back I went to a seminar on use of computer technology in the courtroom, the first presentation the computer equipment failed. After a 20 to 30 minute delay, which in turn delayed the whole day long seminar, the computer equipment was up and running. Make sure you do a run through before your opening.

IX. CONCLUSION

There are many techniques the lawyer can use to get his or her message across to the jury. The best way to properly prepare and deliver that message is to conquer your fear by recognizing that no matter how experienced you are, there will be fear. You should also learn the difference between persuading a jury and pleading with a jury and, in the process, present your cause with character rather than by simply acting. Prior to trial, you need to thoroughly prepare what you are going to say, and then either mentally relax or pump yourself up prior to the trial depending upon your own individual personality and the facts of your case. Finally, your delivery should be conversational, sincere, simple, confident, and with emotion.

1. Dale Carnegie. *The Quick & Easy Way to Effective Speaking*, pp 31-32.
2. Herbert J. Stern, Trying Cases to Win, pp. 24.